FILE COPY

MAY 17 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1383

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI

EDWARD P. RUSSELL,
29th Floor Sterick Building,
Memphis, Tennessee,
Attorney for Petitioner.

B. L. TIGHE, JR.,
Standard Life Building,
Jackson, Mississippi;
CANADA, RUSSELL & TURNER,
29th Floor Sterick Building,
Memphis, Tennessee,
Of Counsel.

INDEX

Subject Index

Petition

	Page
Statement of the matter involved	1
This Court has jurisdiction	4
The question presented	5
Reasons relied upon for allowance of writ	6

Brief

The opinion below	9
Jurisdiction	9
Statement of the case	10
Errors relied upon	12
Argument	12
Conclusion	19

Table of Cases and Authorities

Freeman v. *Hewit*, — U. S. —, 12/16/46	15
Interstate Natural Gas Co. v. *A. H. Stone, Commissioner*, 308 U. S. 522	16
Southern Nat. Gas Corp. v. *Alabama*, 301 U. S. 148	16, 18
Spector Motor Service v. *McLaughlin*, 323 U. S. 101	6, 13
Stone v. *Interstate Natural Gas Co.*, 103 F. (2d) 544 (5 C.)	16

Table of Statutes Cited

Section 237(b), Judicial Code, 28 U. S. C. A., 344(b)	5, 9
Supreme Court Rule 38, 5(a)	10
Chapter 121, 1934 Public Acts of Mississippi	3, 10
Chapter 115, 1940 Public Acts of Mississippi	3, 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1383

MEMPHIS NATURAL GAS COMPANY,

Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,

Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, Memphis Natural Gas Company, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Mississippi.

Summary Statement of the Matter Involved

The question is whether or not Mississippi will be allowed to exact a franchise or excise tax from an undomesticated foreign corporation for the privilege of doing in Mississippi solely interstate business and thus violate the Commerce Clause of the United States Constitution, Article I, Section 8.

The State Tax Commission of Mississippi decided that petitioner is liable for the franchise taxes. Petitioner appealed to the State Circuit Court which reversed the Tax Commission. The Tax Commission appealed to the Supreme Court of Mississippi which reversed the Circuit Court and entered final judgment against petitioner on February 24, 1947 in the approximate amount of $3,400.00 for each of the years 1942, 1943 and 1944 plus statutory interest at 1% per month (R. 22).

The facts are not in dispute. They are clearly and briefly stated in the opinion of the Supreme Court of Mississippi:

> "Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Tennessee and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.
>
> "There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified as a foreign corporation with the right to do intrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employees or representatives in this

State other than those necessary to maintain the pipe line and its related facilities" (R. 19).

Petitioner pays to Mississippi *ad valorem* taxes amounting to approximately $82,000.00 a year (R. 14a) and also an income tax upon that part of its net income fairly attributable to activities in Mississippi.

State Tax Commission v. *Memphis Natural Gas Co.*, 197 Miss. 583 (10/9/44), certiorari denied 323 U. S. 682.

Chapter 121 of the 1934 Public Acts of Mississippi, p. 204 as amended by Chapter 115 of the 1940 Public Acts of Mississippi, p. 105, imposes the "franchise or excise tax" upon both domestic and foreign corporations in such manner that there is no discrimination against foreign corporations. The only question involved is whether or not the tax violates the Commerce Clause.

The Act defines "doing business":

> "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."
>
> "TAX ON FOREIGN CORPORATIONS.—For the year 1940 and anually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being

> the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

The Supreme Court of Mississippi held that:

> "there is no attempt to tax interstate commerce as such"

which petitioner admits. The court then said that the petitioner is liable for the tax

> "as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system throughout the 135 miles of its line in this State."

In other words, the Supreme Court of Mississippi held that petitioner must pay a "franchise or excise" tax for the privilege of owning and maintaining in Mississippi facilities necessary to conduct an exclusively interstate business.

The Supreme Court of Mississippi justified its conclusion by resort to "trends" in judicial writing and, in substance, forecast that a long line of unbroken decisions of this Court are now to be ignored and heaved overboard. It cited no decisions of this Court to sustain its conclusions.

The Court Has Jurisdiction

This Court has explicit authority to review by certiorari a final judgment in the highest court of a State

> "where is drawn in question . . . the validity of a statute of any State on the ground of its being re-

pugnant to the Constitution . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . .'' 237 Judicial Code (b), 28 USCA, 344(b).

In this suit "a state court has decided a Federal question of substance . . . in a way probably not in accord with applicable decisions of this court." Supreme Court Rule 38, 5(a).

This Court has never decided that an undomesticated foreign corporation engaged exclusively in interstate commerce must pay a State a tax for the privilege of engaging in such commerce.

The Federal question was presented to the State Tax Commission in the pleadings filed with the Commission (R. 5) and overruled. It was considered by the Circuit Court and sustained (R. 15). It was considered by the Supreme Court of Mississippi and overruled (R. 19).

The Supreme Court of Mississippi is the highest court of that State and the judgment entered against petitioner on February 24, 1947 is final (R. 22).

The Question Presented

Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi *ad valorem* and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local "franchise or excise tax."

Reasons Relied upon for Allowance of Writ

To a limited extent it has become the fashion for state courts to indulge in judicial prophesies, "trends" and forecasts by jumping at unwarranted legal conclusions and ignoring principles decided by this Court in long and unbroken lines of decisions. The Supreme Court of Mississippi cited not a single decision of this Court to justify its opinion as none are available. It stated that "more recently there has been a pronounced trend" to burden interstate commerce by "a tax as a recompense for the local protection afforded" if the effect is not "to interfere with the national interests." It further stated that the collection of this tax from petitioner is justified for protection of "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State."

This Court has repeatedly stated that such interstate properties may be burdened with *ad valorem* taxes, income taxes upon that part of the net income reasonably attributable to activities within the taxing State, and a proper part of the cost of enforcing police regulations. This Court has never said, however, that the States may go further and exact a toll for the right to use the facilities in interstate commerce.

In *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101 the Circuit Court of Appeals for the Second Circuit was reversed for "foreshadowing 'trends'" by departing from an "unbroken line of decisions" of this Court and sustaining a franchise tax for the privilege of doing an exclusively interstate business in Connecticut.

Connecticut imposed on corporations "a tax or excise upon its franchise for the privilege of carrying on or doing business within the State . . ." The taxpayer, an undomesticated foreign corporation, was engaged in Con-

necticut exclusively in interstate commerce. The Connecticut courts had not previously construed the statute. It was therefore uncertain whether Connecticut intended the tax to be limited to the privilege of doing intrastate business or intended it to go further and be applicable to interstate business. The Federal District Court thought Connecticut intended it to be limited to intrastate business while the Circuit Court of Appeals thought Connecticut intended it to also reach interstate business.

This Court pretermitted the legality of the tax imposition and reversed the Circuit Court with directions that the suit in the Federal Courts be held in abeyance until the courts of Connecticut construed the statute.

This Court said:

> "Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause . . ."

This Court further said:

> ". . . If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

The import of this Court's opinion is that Connecticut will not be permitted to exact a tax for the privilege of engaging exclusively in interstate commerce if the state court construes the statute, as construed by the Second Circuit Court of Appeals, to impose the tax upon a business engaged exclusively in interstate commerce.

This Court has repeatedly stated:

> "that a state law is unconstitutional and void which requires a party to take out a license for carrying on

interstate commerce, no matter how specious the pretext may be for imposing it.".

Mississippi has decided that the petitioner must take out and pay for a license to carry on interstate commerce. The question is whether or not this is now permissible under the Commerce Clause of the Constitution of the United States. The Supreme Court of Mississippi says the "trend" of judicial writing permits the tax. But this violates "a long course of constitutional history" and "an unbroken line of decisions."

We rely on the decisions of this Court which should not be overruled by resort to "trends".

There seems to be probable cause for this Court to review the decision of the Supreme Court of Mississippi as its effect will be devastating if unchallenged.

Respectfully submitted,

EDWARD P. RUSSELL,
29th Floor Sterick Building,
Memphis, Tennessee,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1383

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The opinion of the Supreme Court of Mississippi is printed in full in the record (R. 19) and also at the end of this brief.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, 28 USCA, 344(b) as "a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question . . . the validity of a statute of any State on the ground of its being repugnant to the

Constitution . . . of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution . . . of the United States."

The jurisdiction of this Court is also invoked under Supreme Court Rule 38, 5(a) as "a state court has decided a Federal question of substance . . . in a way probably not in accord with applicable decisions of this court."

Judgment was entered in this suit by the Supreme Court of Mississippi on February 24, 1947 (R. 22).

Statement of the Case

Petitioner was cited by the State Tax Commission of Mississippi to appear and show cause why it should not be required to pay the "franchise or excise" tax imposed by Chapter 121 of the 1934 Public Acts of Mississippi, page 204, as amended by Chapter 115 of the 1940 Public Acts of Mississippi, page 105. The tax is $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed in Mississippi.

Petitioner filed with the State Tax Commission a comprehensive statement of the nature and scope of its business in Mississippi and alleged that the imposition of the tax violates constitutional immunities (R. 5). The Commission disagreed with petitioner and entered an order sustaining the tax liability (R. 4).

Petitioner appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi which reversed the Tax Commission and held petitioner not liable for the taxes as "petitioner is operating wholly and entirely in interstate commerce in the State of Mississippi, and not having qualified or domesticated, and seeking no franchise right or intrastate grant from the State" is not liable for such a tax (R. 16).

The Supreme Court of Mississippi reversed the Circuit Court and entered the final judgment (R. 22).

Petitioner is a Delaware corporation with general offices in Memphis, Tennessee. It owns and operates a pipe line extending from the gas fields in the vicinity of Monroe, Louisiana through the southeast corner of Arkansas, thence crosses the Mississippi River at Greenville and extends north parallel with the Mississippi River into Tennessee where the City of Memphis is its principal market.

A stipulation was made that all of the facts appearing in the petition filed by petitioner with the State Tax Commission are true (R. 13). The Supreme Court of Mississippi summarized in its opinion the undisputed facts and they are, therefore, not repeated at this point.

Petitioner's position is that innumerable decisions of this Court prohibit the levy of a tax for the privilege of doing interstate business. If petitioner had domesticated in Mississippi and thus sought the privilege of intrastate business, a different question would be presented. It is undisputed that the petitioner, during the years involved, was not in any manner qualified in Mississippi to do any local or intrastate business. It is further undisputed that it did not even have an agent for service of process. It is undisputed that every act by petitioner during the years in question was strictly in furtherance of interstate commerce. It is likewise undisputed that petitioner enjoyed no privilege or franchise from Mississippi because it needed none. The privilege or franchise to engage in interstate commerce is assured to all by the Federal Constitution.

A franchise or excise is a privilege granted by the sovereignty to do some act which cannot lawfully be done without this grant from the sovereign power. Petitioner requires no grant from Mississippi because the Commerce Clause confers upon all the right to engage in interstate business without having to pay a state for the privilege.

Errors Relied Upon

The Supreme Court of Mississippi erred in holding that Mississippi can exact a franchise tax from an undomesticated foreign corporation for the privilege of doing solely interstate business because the imposition of the tax violates the Commerce Clause of the United States Constitution.

The court further erred in holding that petitioner's activities "in maintaining, keeping in repair, and otherwise in manning the facilities of the system" for interstate commerce are local activities which enable Mississippi to exact a privilege tax.

The Supreme Court of Mississippi further erred in basing its decision on a "trend" of the times and thus ignoring a long line of decisions of this Court that a state may not exact a tax for the privilege of carrying on interstate commerce.

The Supreme Court of Mississippi further erred in holding that it is permissible to exact this privilege tax from interstate commerce because a similar tax is exacted by Mississippi from its domestic corporations.

Argument

It will be of questionable value to undertake at this point an extended argument about the vices of a direct privilege tax imposed upon interstate commerce. The question has been discussed and passed upon in numerous decisions by this Court. There have been several recent decisions of this Court plainly manifesting the purpose of this Court to adhere to the principle that a state cannot tax the privilege of engaging in interstate commerce.

The invalidity of the tax can be demonstrated by reference to innumerable decisions of this Court. The Supreme Court of Mississippi made no mention of any of them

though many of the leading cases on the subject were cited and discussed in petitioner's brief in the Supreme Court of Mississippi.

The great importance of the question here involved is emphasized in a recent decision of this Court.

Spector Motor Service v. *McLaughlin*, 323 U. S. 101.

Connecticut imposed on business within the state "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state . . ."

This court said:

> "* * *. Petitioner, a Missouri corporation with its principal place of business in Illinois, is engaged exclusively in the interstate trucking business. It is neither authorized by Connecticut to do intrastate trucking nor in fact does it engage in it. It maintains two leased terminals in Connecticut solely for the purpose of carrying on its interstate business. At the request of its lessor, it has filed with the Secretary of State in Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service of process, and has paid the statutory fee."

The State Tax Commissioner decided that there was liability for the tax, and thereupon the taxpayer sought an injunction in the United States District Court, alleging that the tax offends provisions of the Commerce and Due Process Clauses of the United States Constitution.

This Court said:

> "The District Court construed the statute to be 'a tax upon the exercise of a franchise to carry on intrastate commerce in the state' and therefore not applicable to the petitioner."

The Circuit Court of Appeals for the Second Circuit construed the statute to reach all corporations, whether engaged in intrastate or interstate commerce.

This Court said:

"* * *. It was conceded below that if the Connecticut tax was construed to cover petitioner it would run afoul the Commerce Clause, were this Court to adhere to what Judge Learned Hand called 'an unbroken line of decisions.' On the basis of what it deemed foreshadowing 'trends', the majority ventured the prophecy that this Court would change its course, and accordingly sustained the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here. 322 U. S. 720, 64 S. Ct. 1155.

"Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause. * * *

This Court further said:

"* * *. If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

"* * *. But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below."

The Circuit Court of Appeals was reversed and the suit remanded to the District Court with directions that the litigation be held "in the federal courts until definite determinations on local law are made by the state courts * * *."

The import of the decision by the Supreme Court of the United States plainly is that lower courts are not to be encouraged to guess and speculate about possible trends in the Supreme Court of the United States by departing from "an unbroken line of decisions" and sustaining a franchise tax for the privilege of doing exclusively interstate commerce, as such a tax violates "an unbroken line of decisions."

The attention of the Supreme Court of Mississippi was directed to

Freeman v. *Hewit*, — U. S. — (12/16/1946),

in which this Court said:

> "A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."
>
> . . . . . .
>
> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. ***But it cannot aim to control that trade even though it desires to control its own.*** It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to

the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

* * * * * * *

"Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."

To offset the foregoing the only Federal case cited by the Supreme Court of Mississippi is:

Stone v. *Interstate Natural Gas Co.*, 103 F. (2) 544 (5 C).

It was affirmed in

Interstate Natural Gas Co. v. *A. H. Stone, Commissioner*, 308 U. S. 522.

The entry was:

"December 11, 1939. Per curiam. The judgment is affirmed. Southern Natural Gas Corporation *v.* State of Alabama, 301 U. S. 148."

The Supreme Court of Mississippi took the position that *Interstate Natural Gas Co.* v. *Stone* authorizes imposition of the tax upon petitioner, but such reasoning is erroneous. The suit involved this same Mississippi franchise statute. Interstate, also a natural gas pipe line extending from

Louisiana to and through Mississippi, was held liable for the tax because, as emphasized in the opinion:

> "As a foreign corporation it filed with the Secretary of State under other statutes as a prerequisite to doing business in Mississippi a copy of its charter, and paid a required fee of $500, and appointed an agent for service of process."

The court said the effect of doing these things is that:

> "When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense."

If a corporation elects to enter a State and seek a local privilege, it must pay therefor and cannot avoid the tax on the ground that the greater part of its business is interstate. The election to either do or seek the privilege of doing a very trifling amount of local business is adequate to sustain the privilege tax.

In this case of *Stone* v. *Interstate Natural Gas Company* the court has above twice emphasized the effect of the foreign corporation filing its charter, appointing a process agent and paying $500.00 for the privilege of local business. To be certain that the reader clearly understands the basis for the decision, the court tells the reader a third time about the effect of filing the charter and naming an agent for service of process. The court said:

> "By the Legislature's queer definition, a foreign corporation formed for profit is doing business in Mississippi and is taxable as soon as it gets ready to be active by having property there and enjoying the protection of the State for it, and qualifies formally by filing its charter and naming its agent for process

service. *These latter acts clearly mark its appearance in the State.*"

The court reemphasizes the controlling point for a fourth time:

> "The charter which the Gas Company filed and obtained the right to enjoy in Mississippi grants to it power to do much more than to engage in the interstate transportation of gas and oil."

In its simplest form, Interstate was liable for the tax because it chose to file in Mississippi its charter and thereby secured the right to do a local business.

This Court refused certiorari in the *Interstate* case on the strength of the following case in which the foreign pipe line corporation also qualified to do intrastate business: *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148.

Mr. Chief Justice Hughes stated:

> "Appellant was organized prior to May 12, 1928, under the laws of Delaware and on that date it qualified to do business in Alabama. It named a statutory agent and filed in the office of the Secretary of State a copy of its charter which covers a wide range of activities. It has paid annually the required permit fee. At the time of the assessment in question appellant maintained its office and chief place of business in the city of Birmingham, Ala. The entire management, control, and conduct of its business was conducted from that office."
>
> * * * * * * *
>
> "By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized."
>
> * * * * * * *
>
> "From the agreed facts we are unable to conclude that the business thus conducted in Alabama was

entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character."

In addition to the foregoing activities, this Court pointed out that Southern Natural Gas Corporation actually distributed gas in Alabama which is intrastate business. It necessarily follows for a number of reasons that it was liable for the franchise taxes. It is obvious that *Stone* v. *Interstate Natural Gas Co.*, affirmed on the strength of *Southern Natural Gas Corporation* v. *Alabama*, was correctly decided because, as stated in *Stone* v. *Interstate Natural Gas Co.*, the pipe line corporation qualified in Mississippi

> "formally by filing its charter and naming its agent for service of process. These latter acts clearly mark its appearance in the State."

Petitioner, Memphis Natural Gas Company, has not done these things and the decision is therefore not applicable to it and has been erroneously applied.

Conclusion

We respectfully submit that the Supreme Court of Mississippi has gravely erred and that probable cause has been shown for this Court to review its decision.

Respectfully submitted,

EDWARD P. RUSSELL,
29th Floor, Sterick Building,
Memphis, Tennessee,
Attorney for Petitioner.

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,329

(Opinion Rendered February 24, 1947)

In Banc

A. H. Stone, *Chairman*,

vs.

Memphis Natural Gas Company

Griffith, *J.*:

Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Tennessee, and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.

There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified as a foreign corporation with the right to do intrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employes or representatives in this State other than those necessary to maintain the pipe line and its related facilities.

The State, through its Tax Commission, has demanded of appellee company the payment of the corporation franchise tax imposed under Secs. 9312-9340, Code 1942, for the years 1942, 1943, and 1944, and has entered its order adjudging appellee liable therefor, from which order appellee, under Sec. 9328, has appealed for a review by the courts, contending that inasmuch as appellee does no intrastate business whatever in Mississippi, and is not qualified to do any intrastate business therein, no tax of any kind can be levied by the State against it other than the ad valorem taxes which it has always fully paid—that any other tax, and particularly a franchise tax, would be to tax interstate commerce.

The franchise tax here sought to be collected by the State is not a tax upon "doing business" as that term is ordinarily understood in the purely commercial sense, but is that which is defined in the statute Secs. 9312 and 9314, as follows: "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.

This statutory definition was first approved in the connection here involved as within the power of the State in Stone *v.* International Natural Gas Co., 103 Fed. (2nd) 544, affirmed 308 U. S. 522. Subsequently, in a connection equally pertinent in principle, it was approved and sustained by this Court in Stone *v.* General Contract Purchase

Corp., 193 Miss. 301, 312, and in Stone *v.* General Electric Contracts Corp., 193 Miss. 317; it being further held in the latter case that when the incidental local activities come within the definition, it would be immaterial that the foreign corporation had no local agents, and has no office, and is not qualified to do any intrastate business in this State.

It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the free flow of such commerce.

And more recently there has been a pronounced trend that, in order to make a more reasonable accommodation between local needs and the domniant requirement of freedom in the national commerce, recognition shall be given to a rule as follows: That although a particular activity may be essential to the continued full and unimpeded flow of commerce between the states as regards a particular commodity or other matter of such commerce, yet if that activity is of a substantial character, and is one which actually and distinctly happens in the particular State and must be, and is, protected by that State regardless of the ultimate purpose of the activity, then for the purpose of laying a tax as a recompense for the local protection afforded, the State may detach the activity so long as the exaction on account of it is not made a pretext to impose a burden which would have the effect, beyond that which is remote or unsubstantial, to interfere with the national interests.

The present case may be reduced, therefore, to two questions: (1) Are the incidental local activities carried on by appellee corporation in this State substantial in nature and extent,—the active maintenance, supervision and repair in this state of 135 miles of pipe line and its related equipment? An affirmative answer to that question is obvious. (2) Does the franchise tax here demanded amount

to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative.

Reversed and Judgment Here for Appellant.